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Sales-Passing of Title-Appropriation of Goods By Vendor

SALES—PASSING OF TITLE—APPROPRIATION OF GOODS BY VENDOR—Thompson-Weber Co. contracted to pack and sell F. O. B. sellers' place 1,000 cases of tomatoes for Jos. A. Goddard Co. during the canning season of 1927. Credits which Jos. A. Goddard had with Thompson-Weber Co. were to be applied as payment in part. On Oct. 15, Thompson-Weber Co. had packed 950 cases, put Goddard's label on them, and set them aside in a separate pile. He notified Goddard of this act and also stated that he would ship the next day, which was the 16th of October. On Oct. 16 one Craig Brokerage Co. offered to buy and had Thompson-Weber ship the 950 cases to them under a bill of lading. Craig Brokerage Co. accepted the draft sent them knowing that the goods bore Goddard's labels, and then took possession of the goods. This action is by Jos. Goddard Co. in replevin v. Craig Brokerage Co. *Held*—The terms "F. O. B. sellers place" in the contract relate only to price and not to time title passes. By appropriation or setting aside, the title to the 950 cases passed to the buyer and the subsequent sale to the appellant gave him no title to the tomatoes. *Craig Brokerage Co. v. Jos. A. Goddard Co.*, 175 N. E. 19 (Ind. App. 1931).

Title is accompanied with several incidents which are of considerable importance in the law of sales. The most important incident is the risk of accidental loss or damage. In a sale the law *presumes*, unless a contrary intention of the parties appears, that the risk was intended to follow title as an incident to it. *Williston on Sales*, Ed. 2, Sec. 302, *Jessup v. Fairbanks*, 38 Ind. App. 673, 78 N. S. 1050. As a matter of illustration, when the title remains in the seller, for other than security purposes, the risk of accidental losses or damage is on the seller; and, likewise, when title passes by virtue of the sale to the buyer, he must bear the risk, *Foley v. Felrath*, 98 Ala. 176, 13 So. 485; *Strauss Saddle Co. v. Kingman*, 42 Mo. App. 208; *Allyn v. Buor*, 37 Ind. App. 223, 76 N. E. 636. The right to sell is another very important incident of title and it is the only one involved in the instant case. It necessarily follows that one who has title to goods may by sale transfer title to a buyer; but, as a general rule, after title has passed to the buyer the seller may no longer transfer title to a third party. Incidentally, there is a well recognized exception to the rule. If retention of possession by the seller is found, as a question of fact for the jury, to be fraudulent as against creditors and *bona fide* purchasers, a third party who relies upon the fraudulent possession of the seller in purchase of the goods will prevail in title as against the buyer who allowed the possession to remain in the seller. *Burns*, 1926, 8050. See *Rose v. Colter*, 76 Ind. 590; *Hardy v. Mitchel*, 67 Ind. 485; *Noble v. Hines*, 72 Ind. 12; *Spaulding v. Blythe*, 72 Ind. 93; *Powell v. Stickney*, 88 Ind. 310; *Rinn v. Rhodes*, 93 Ind. 389. Also, *Seavy v. Walker*, 108 Ind. 87, 9 N. E. 347; *Higgins v. Sparr*, 145 Ind. 167, 43 N. E. 11. *Williston on Sales*, Ed. 2, Sec. 311. Also as an incident of title there must be added the right of creditors to possess themselves of the goods to which their debtor has title.

Martin v. Adams, 104 Mass. 262. Since these incidents follow title, our concern is to locate title; and, then, the legal effect of these incidents will result to title wherever it may rest.

Title to goods not yet manufactured can not be presently passed for the parties can not by their acts pass title to goods which do not exist. *Gile v. Laselle*, 89 Ore. 107, 171 P. 741. Then a contract to pack or manufacture goods in contemplation of the law of sales is nothing more than a contract to sell when the goods come into existence. *Herring Motor Co. v. Aetna Trust Co.*, 87 Ind. App. 83, 154 N. E. 29. The title to the goods manufactured may pass on their coming into existence if the parties expressly state such intention in the contract of sale or when such intention can reasonably be inferred from the contract. *Clarkson v. Stevens*, 106 U. S. 505; *Coddington v. Turner*, 85 Ind. App. 604, 139 N. E. 323. But the buyer rarely expresses his intention in so many words and out of this fact arises the problem of ascertaining his intention. In this plight the law comes to our aid with the presumption that title to goods just completed by the seller under a contract to sell does not pass without some subsequent act of appropriation assented to by the parties. *Enterprise Wall Paper Co. v. Milson Rantoul Co.*, 260 Pa. St. 540, 102 Atl. 923; *Churchhill Grain Co. v. Newton*, 88 Conn. 130, 89 A. 1121; *Proctor and Gamble Co. v. Peters*, 233 N. Y. 57, 124 N. E. 849; *Fordic v. Gibson*, 129 Ind. 7, 28 N. E. 303. Again the buyer seldom states expressly just what act by the seller will be a sufficient appropriation, so it is necessary to resort to inferences from the terms and circumstances of the bargain. *Williston on Sales*, 2 Ed., p. 558. The buyer's assent may be inferred from a course of business between the parties. *Bundy v. Meyers*, 148 Minn. 352, 181 N. W. 345. Or from mere setting the goods aside, the buyer is said to impliedly consent without notice of the act. *Atkinson v. Bell*, 8 Bern. & C. 277; *Western Hat & Manufacturing Co. v. Berkner Bros.*, 172 Minn. 4, 214 N. W. 475; *Andrew v. Cheney*, 62 N. H. 404. Most jurisdictions will require an express acknowledgment by the buyer after he is informed of the seller's act in setting the goods aside (appropriation) for him. *Winslow Bros. & Smith Co. v. Universal Coat Co.*, 252 Mass. 7, 146 N. E. 713; *Soss Manufacturing Co. v. Mitchel Motors Co.*, 196 N. Y. S. 304; *Coddington v. Turner*, 85 Ind. App. 604, 139 N. E. 323; *Herring Motor Co. v. Aetna Trust Co.*, 87 Ind. App. 83, 154 N. E. 29; *Fordic v. Gibson*, 129 Ind. 7, 28 N. E. 303. In the instant case the seller informed the buyer that the goods were packed and set aside or, in other words, had been appropriated to the contract. The buyer did not reply to the notice, but even with such facts there are numerous cases supporting the view that the buyer impliedly assents to the appropriation unless he dissents within a reasonable time. *Berkshire Cotton Mfg. Co. v. Cohen*, 236 N. Y. 262, 140 N. E. 726; *Wm. Whiteman Co. v. Whitcomb*, 204 N. Y. S. 417; *Acme Wood Carpet Flooring Co. v. Braddock* (facts almost identical to the principal case) 203 N. Y. S. 554. Payment, as made in the instant case, is another important item to be taken into consideration in determining the time the buyer assents to an appropriation of the goods. One who pays for goods ordinarily desires title at the earliest opportunity to prevent possible loss from bankruptcy of the seller, seizure by creditors of the seller, or a

fraudulent sale by the seller; so it was held in *Hopkins v. Bronaugh*, 281 Fed. 799, that a purchaser who pays in advance assents impliedly to take title when the seller sets aside the newly manufactured goods. The added fact, in the instant case, that the seller labeled the cans as those of the buyer also strongly supports the contention that the seller intended to appropriate the goods to the buyer. *Sift v. Wright & Weslosky Co.*, 113 Ga. 681, 39 S. E. 503; *Mitchel v. La Claire*, 98 Mass. 152. On authority, the court is correct in deciding that title passed to the buyer when the goods contracted for were labeled and set aside and the buyer given notice of the appropriation.

It is the general rule that title does not pass by appropriation unless the goods appropriated by the seller conform to the contract in kind, quality and quantity. *Richardson v. Dunn*, 2 Q. B. 218; *Sutherland Medicine Co. v. Baltimore*, 81 Ark. 229, 98 S. W. 966; *Downs v. Marsh*, 29 Conn. 409; *Weil v. Stone*, 33 Ind. App. 112, 69 N. E. 698. In the instant case the contract called for 1,000 cases of tomatoes and the seller appropriated but 950 cases to the contract. At first blush this casts some doubt on the court's opinion in the case, but it might well be successfully argued in favor of the decision that the buyer assented in advance to take title to each can as it was labeled and set aside by virtue of the fact that the buyer had paid in advance and had his labels placed on the cans as soon as they were packed. Title by such a contention, would pass to any number of cans that the seller finished regardless of the fact that the contract called for 1,000 cases. But if one does not wish to go to this degree to support the case, it can be forcefully argued for the same reason that title passed to every case that was set aside as the goods of the buyer.

The appellant says that the legal presumption as to the passage of title is overcome in the instant case by an expression in the contract of sale that title shall pass only on delivery to the buyer. He insists that the words "F. O. B. sellers place" in the contract of sale reveal an intention not to pass title until the goods are at least put in the hands of a carrier for shipment to the buyer. In the light of authority, unless some other expression of intention appears, the mere presence of an F. O. B. provision does not affect the question of when title passes to the buyer. The terms F. O. B. should be construed to mean nothing more than that the *price* of the goods should include the freight charges from the seller's shipping point to the buyer's. *Sterling Coat Co. v. Silver Springs, etc., Co.*, 162 Fed. 848, 89 C. C. A. 520; *Barnett & Record Co. v. Fall*, 62 Tex. Civ. App. 391, 131 S. W. 644; *Standard Casing Co. v. California Casing Co.*, 233 N. Y. 214, 135 N. E. 834; *U. S. v. Andrews*, 207 U. S. 229, 28 Sup. Ct. Rep. 100.

The principal case is not decided under the sales act which was adopted in Indiana in 1929, but undoubtedly the same result would be reached had the decision been controlled by the act.

J. B. E.